1975

Jenny Johanson Norling v. Joseph Anderson, June J. Anderson And Esther J. Finich : Petition For Rehearing Of Defendants-Appellants

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

JENNY JOHANSON NORLING, Plaintiff and Respondent, -v- JOSEPH ANDERSON, JUNE J. ANDERSON and ESTHER J. FINCH, Defendants and Appellants.	)	PETITION FOR REHEARING Case No. 13769
In the Matter of the Estate and Guardianship of JENNY JOHANSON NORLING, An Elderly Person.	)	Case No. 13764

PETITION FOR REHEARING OF DEFENDANTS-APPELLANTS

J. RICHARD BELL
BELL & BELL
303 East 2100 South
Salt Lake City, Utah 84115

Attorney for Plaintiff-Respondent.

WILLIAM H. HENDERSON
Suite 104 - John Hancock Bldg.
455 South Third East
Salt Lake City, Utah 84111

Attorney for Defendants-Appellants.

TABLE OF CONTENTS

STATUTES CITED

CASES CITED

AUTHORITIES CITED

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JENNY JOHANSON NORLING, Plaintiff and Respondent, -v- JOSEPH ANDERSON, JUNE J. ANDERSON and ESTHER J. FINCH, Defendants and Appellants. - - - - - - - - - - - - In the Matter of the Estate and Guardianship of JENNY JOHANSON NORLING, An Elderly Person.	)	PETITION FOR REHEARING Case No. 13769 Case No. 13764

PETITION FOR REHEARING OF DEFENDANTS-APPELLANTS

Petitioner petitions for rehearing in the above cases and as cause for same alleges:

This court did not render a decision on appellants' points on appeal. Instead, the court humorously quips a decision on just one item of appellants' contentions. Humorous, of course, to the author of the opinion and the justices who concurred in it. But not to appellants. These law suits were very serious to appellants

Andersons particularly encompassing as they do most serious economic transaction of their lives. Appellants submit that the court and each justice comprising the court have an obligation to render a decision by the court on each point presented on appeal. Following we submit is where the court failed in this obligation.

NORLING v. ANDERSON ET AL, CASE NO. 13769

1. THE APPELLANTS' CONTENTION THAT TITLE PASSED ON AUGUST 2, 1973 (Brief 18-22)

Appellants contended that the deed to the real property involved was delivered by Norling to the Andersons on August 2, 1973 and on that day (August 2, 1973) title to the property passed from Norling to the Andersons. This contention was based on the following items:

(a) Finding

In Finding 2, the lower court found that:

> . . . after execution of the deed, the deed was delivered to defendant June J. Anderson who initialed the deed to indicate delivery of the same, the attorney stating that a deed must be delivered in order to be valid. (Brief 8)

(b) Uncontradicted Evidence

The uncontradicted evidence of attorney Merrill K. Davis was that the deed was prepared by him at the request of Norling, that Norling told Davis that she wanted the property to go to the Andersons since they had been staying with her and taking care of her; that he explained to her the difference between a will and a deed; that with a deed there was no need of a will and the property would not have to be probated. (Brief 7-10)

The uncontradicted evidence and the testimony of Mrs. Norling was that at the time she executed the deed and delivered it to June Anderson she intended the Andersons to have the property, that she was not mad at the Andersons at that time, and that it was not until after the execution of said deed and after she went to live with other brothers and sisters that she changed her mind. (Brief 14-16)

Not a single word of testimony or evidence is mentioned in respondent's brief or in the court's decision contradicting the testimony of Mr. Davis and Mrs. Norling. One would surmise from reading the court's decision that there was no such testimony.

(c) Appellant's Authorities

Besides Jordan v. Jordan, 21 U 2d 348, 445 P 2d 765 (1968), appellants cited and relied on the following authorities which specifically hold that when a grantor executes and delivers a deed with the intention that the grantee have the property, a subsequent change of mind cannot upset the conveyance: Simmons v. Murphy (Ark) 360 SW 2d 765 (1962), citing 26 C.J.S. Deeds, Sec. 41; Wilcox v. Hardisty (Cal App.) 212 P 633; Lossee v. Jones, 120 U 325, 235 P 2d 132 (1951).

This is Horn Book law.

THE COURT'S DECISION ON APPELLANTS CONTENTION

The court's decision deals only with item (a) Finding, namely, the physical delivery by Mrs. Norling on August 2, 1973 with the instructions of the attorney, that June Anderson initial the deed to show delivery, and the return of the deed to possession of Norling. The court describes this as "a bit of Houdini routine."

Merrill Davis' directions that Jack Anderson initial the deed to show delivery was lawyer-like and most responsible inasmuch as Mrs. Norling was to take custody of it.

Neither respondent nor the court cite a single authority contrary to the above authorities that when a grantor physically delivers a deed to the grantee with the intention that the grantee have the property, an unrevealed mental reservation or a subsequent change of mind does not affect the passing of title of the deed upon delivery.

In lieu of authority to support its decision, the court searches out factual distinctionsin the Utah cases cited. Some factual distinctions always exist between cases. The court's factual distinctions do not bear on the law stated in the decisions.

In distinguishing Jordan (cited above), the court states that in that case the grantor's lips were sealed by death, wheras the grantor in the instant case was alive and testified. But the court does not point out what Mrs. Norling, the grantor, testified. Which was that at the time of the delivery of the deed, August 2, 1973, she wanted the Andersons to have the property, that she was not mad at them at that time, and that she thereafter changed her mind. Not a single word of testimony, by Mrs. Norling or otherwise, is in the record contradicting this testimony. Nor does the court point out Mr. Davis' testimony that Mrs. Norling told him she wanted the Andersons to have the property since they had been staying with her and caring for her. Not a single word of contrary evidence or testimony is referred to in respondent's brief or in the court's decision.

In distinguishing Lossee the court said it is "inappropros here since it has to do with a delivery to a trustee who was interdicted to deliver a deed to the grantees after the death. But what has that to do with the principle of law in Lossee that appellants rely upon, namely, that a grantor cannot change his mind.

The court follows the footsteps of the lower court and appears to rule that as the deed of August 2, 1973 was executed concurrently with the codicil of Norling's will (same date) and the fact that there were prior deeds and wills of Mrs. Norling, that Norling intended the document to be a will rather than a deed--the court referred to the deed as "in the nature of an instrument ambulatoria voluntis".

What relevance have past deeds and wills to the execution of the deed of August 2, 1973 when we have a competent grantor whose lips were not sealed by death and who told the attorney her intention was to deed her property to the Andersons and so testified. (The prior deeds were torn up and destroyed and renounced by the grantees by reason of the changes in the financial situations of the children). (Brief 20)

It is common practice for attorneys to draft wills concurrent with deeds disposing of the same property. And where, as here, the attorney fully explains to the grantor that the deed would obviate probate, what relevance can past transactions have to do with the question of delivery on August 2, 1973?

The term ambulatori voluntis appears to define the nature of a document and particularly refers to a "changeable will" rather than a principle of law. Blacks Law Dictionary, Revised Fourth Ed; Bouviers Law Dictionary (Rawles Edition). See also Monninger v. Koob, 405 Ill. 417, 91 NE 2d 411, 414 (1950).

However appellants do find the case of Fonda v. Miller, 411 Ill. 74. 103 NE 2d 98 (1952) ruling on the question of whether a deed should be considered a will where the grantor retained possession of the deed and it was never in fact delivered to the grantee but retained in the possession of the grantor's attorney (where grantor had retained a life estate). In Fonda the grantor after execution also changed his mind. And in his will he repudiated the delivery reciting that it had not been his intention that it convey title. (In norling's Codicil she recited that she had conveyed title to the property involved.) In Fonda the lower court found that the delivery

> . . .was intended to operate as a testimentary disposition of said real estate, and that said deed was never delivered to the grantees named thereon. (same situation as in instant case)

The appellate court in Fonda reversed this decision, holding that

> The deed in the present case was executed with all the formalities required by law and made under the advice of an attorney who was fully aware of the requisites and differences between a deed and a will.
>
> . . .
>
> Courts do not attach as much importance to the manual possession of the deed as they do to the intent of the grantor as gathered from the evidence in regard to the vesting of title.

> The execution of the deed with the formality required by law, the consultation with an attorney at the time of making it, and the subsequent acts of the grantor recognizing the title of the grantees until he became displeased with Mrs. Miller's refusal to execute a deed at his request, all indicate beyond any doubt that he intended the deed to take effect immediately upon its execution and recording.
>
> . . .
>
> The law does not make the grantor's retention of a deed duly executed proof of non-delivery, especially where he still retains the right of enjoyment.

The conclusions of the court that the deed of August 2, 1973 was an "instrument ambulatoria voluntis" was basically conceived by the court. A party has no opportunity to respond when the court enters the arena. In the original verified complaint, plaintiff alleged that the deed was conditionally delivered not to be recorded until plaintiff died. In the unverified amended complaint plaintiff alleged that after signature, the deed was deposited in the safety deposit box to remain until after the plaintiff's death.

The "bit of Houdini routine" was not in Mr. Davis' handling of the execution of the deed and having June Anderson acknowledge acceptance of delivery before giving back possession to Mrs. Norling, but in the court's transposing a deed into a will (absent legal precedent).

2. APPELLANTS' CONTENTION THAT EVEN IF THE DEED WAS DELIVERED BY MRS. NORLING ON CONDITION THAT IT NOT BE RECORDED UNTIL AFTER HER DEATH, THAT COULD NOT AFFECT THE PASSING OF TITLE ON AUGUST 2, 1973. (Brief 22)

This contention should be answered if the court adheres to its decision that there was no intent to deliver on August 2, 1973 and that such delivery represented no authority to June to record the deed on January 11, 1974. From respondent's complaint and amended complaint, the theory of respondent and the court appears

that the deed was delivered on condition that it not be recorded until Norling's death.

In support of appellants' contentions that a condition against recording could not prevent title passing, appellants cite Takacs v. Takacs, 317 Mich 72, 26 NW 2d (1947), citing 26 C.J.S. Deeds, Sec. 48, pp. 251-52, 28 Am Jur 2d Escrow, Sec. 12, holding that such an attempted delivery vests title in the grantee regardless of such condition.

Neither respondents nor the court cite contrary authority.

THE COURT'S DECISION ON APPELLANT'S CONTENTION

The court states not a single word on this contention.

NORLING GUARDIANSHIP, CASE NO. 13764

This case involves whether Mrs. Norling, by reason of old age, weakness of mind, was able unassisted to properly manage and take care of her property and would be likely to be deceived or imposed upon by artful or designing persons (Utah Code 75-13-20).

3. APPELLANT CONTENDED THAT THE LOWER COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR A MENTAL EXAMINATION UNDER RULE 35 (SPECIFICALLY PROVIDING FOR MENTAL EXAMINATIONS) UNDER THE UNCONTRADICTED SHOWING THAT SUCH EXAMINATION WOULD DETERMINE NORLING'S MENTAL CAPACITY TO CARE FOR HER PROPERTY OR HER LIKELIHOOD TO BE IMPOSED UPON BY ARTFUL AND DESIGNING PERSONS. (Brief 11)

Even after the court had denied the motion, and trial was had without the benefit of such examination, it again refused to order examination despite Dr. Verne Peterson's testimony that it "would

be rather a pleasant hour" as opposed to a trial setting.

Respondent does not respond to this contention except to state the notice of hearing was one day defective. No continuance was asked and this motion, as all other motions, were heard at the earliest possible date to comply with the request of respondent's attorney.

THE COURT'S DECISION

The court does not rule on this contention, not a word.

4. APPELLANTS' CONTENTION THAT THE LOWER COURT ERRED IN NOT APPOINTING A GUARDIAN OF NORLING'S ESTATE ON THE UNCONTRADICTED EVIDENCE THAT SHE HAD SUFFERED BRAIN DAMAGE, WAS INCOMPETENT TO PROPERLY MANAGE HER PROPERTY AND WAS LIKELY TO BE IMPOSED UPON BY ARTFUL AND DESIGNING PERSONS (Brief 10-11)

Relevant to this point, the court will notice that the lower court did not weigh the evidence and elect to make findings as it could have done under Rule 41 (b). See Petty v. Cindy Manufacturing Corp., 17 U 2d 32, 404 P 2d 30 (1965); Lawrence v. Bamberger Ry Co., 3 U 2d 247, 282 P 2d 335 (1952). The lower court did not find Mrs. Norling competent. It granted a non-suit, ruling that "there was not sufficient evidence presented by the petitioner in support of her petition to show the need for an appointment of a guardian in the Estate of Jenny Johanson Norling." Thus the duty of this court was to determine whether or not there was sufficient evidence to show Mrs. Norling's incompetency under Utah Code 75-13-20.

Mrs. Norling's situation appears to fall precisely within Utah Code 75-13-20. In her deposition of April 22, 1974 (p. 67) she testified:

> . . .after I got that pneumonia, I've never been so sick in my life. . . . That sickness took an awful lot out of me.
>
> . . .
>
> I always have had to take care of myself. . . But now I'm too old.

And the testimony of Dr. Verne Peterson, eminently qualified, that Mrs. Norling had suffered brain damage and was incompetent to properly manage her property and was likely to be imposed upon by artful and designing persons, stands uncontradicted.

THE COURT'S DECISION

The court does not rule on this contention. Not a word.

The court's decision in these cases is a grave miscarriage of justice.

It is respectfully submitted that petition for rehearing should be granted.

Date: June 3, 1975.

William H. Henderson

WILLIAM H. HENDERSON
Attorney for Appellants.

CERTIFICATE OF MAILING

Copy of the foregoing mailed to J. Richard Bell, Esq., attorney for respondent, at his office this 4th day of June, 1975.